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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

LANCE SWAIM,

Plaintiff and Appellant,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendant and Respondent.

F058124

(Super. Ct. No. S-1500-CV-260976)

OPINION

APPEAL from a judgment of the Kern County Superior Court. Linda S. Etienne, Commissioner.

Lackie, Dammeier & McGill and Michael A. McGill for Plaintiff and Appellant.

Debra L. Ashbrook, Chief Counsel, and Stephen A. Jennings, Staff Counsel, for Defendant and Respondent.

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Appellant, Lance Swaim, was employed by the California Department of Corrections and Rehabilitation (CDCR) as a correctional officer. While appellant was off-duty, a

vehicle in which he was riding struck a parked truck. Appellant attempted to contact the owner of the truck but was unsuccessful. He then left the accident scene.

Witnesses stated that a man was driving at the time of the accident. Appellant, however, claimed that his wife, Melanie Swaim, was behind the wheel. CDCR initiated an internal affairs investigation and, after finding that appellant was driving at the time of the collision, fired him for dishonesty. Appellant's termination was upheld following a hearing before an administrative law judge (ALJ) for the California State Personnel Board (Board).

Appellant challenges his termination on two grounds. He argues that the ALJ's decision was not supported by substantial evidence and that the Board abused its discretion when it terminated his employment.

As discussed below, substantial evidence supports the evidentiary findings and no abuse of discretion occurred. Accordingly, the judgment will be affirmed.

BACKGROUND

Appellant became a correctional officer in July 1996. Before this incident, he had no adverse actions. His performance evaluation in October 2003 rated him above standard overall and he was promoted to correctional sergeant in March 2004.

On an April afternoon in 2004, a GMC Jimmy collided with a parked Chevrolet pickup truck on a residential street. Although no one witnessed the crash, several people observed the aftermath.

Danny Mossman saw the Jimmy being parked across the street from the truck in a dirt lot. He then saw appellant exit the Jimmy from the driver's side. Mossman did not see any other occupants in the car. A short time later, Mossman saw appellant get back in the Jimmy and drive away. Mossman followed the Jimmy for a short distance and wrote down a partially accurate license plate number. Mossman testified that appellant was driving based on his having seen appellant's reflection in the Jimmy's side mirror.

Ronald Mattlin heard the crash while he was inside his apartment. When Mattlin went outside he saw appellant pacing back and forth by the Jimmy. Mattlin then observed appellant get back in the car and drive away across a vacant lot.

Jocelyn Rowley was also at home at the time of the collision. She heard a loud noise and looked out the window. At that time, Rowley saw appellant backing up the Jimmy. A woman was in the passenger seat. Rowley observed appellant exit the Jimmy on the driver's side and the woman exit through the passenger door. Appellant and the woman then came to Rowley's door and asked her who owned the parked truck. Appellant told Rowley "I hit the truck." Rowley and appellant spent about 20 minutes trying to locate the truck's owner without success. Appellant and the woman then left.

After appellant left the accident scene, the truck's owner, David Banks, was informed by Rowley that his truck had been damaged. Banks called the police department to report the accident.

Officer Saso was dispatched to the accident scene. He took statements from the witnesses and spoke to Banks.

Appellant, his wife Melanie, and their daughter returned to Banks's apartment later that afternoon. Officer Saso had already left. Appellant and Melanie explained to Banks that Melanie had accidentally hit his parked truck and they exchanged insurance information. Banks told appellant that he had filed a hit-and-run report but that he would call the police department to cancel that report.

After returning home, Melanie called the police department to inform them that she was the driver involved in the accident. Thereafter, Officer Saso met with Melanie in person. Melanie also took Saso to where the Jimmy was parked. The Jimmy belonged to appellant's brother, Taylor Swaim, and was at his apartment.

Officer Saso's report concluded that appellant had committed a misdemeanor hit-and-run and that Melanie had provided false information to a police officer. Appellant and

Melanie were so charged. However, Melanie later pleaded no contest to a charge of misdemeanor hit-and-run and the count against appellant was dismissed.

The CDCR Office of Internal Affairs investigated this accident. When interviewed by CDCR, appellant claimed that he was not the driver of the Jimmy. CDCR concluded that appellant's denial was false and he was fired for dishonesty. Appellant appealed to the Board.

At the hearing before the ALJ, appellant presented an alternative version of the accident. According to appellant, Melanie was driving the Jimmy, he was in the front passenger seat, and Tina Mooney was sitting in the back. Tina Mooney was Taylor Swaim's girlfriend. Appellant stated that, following the collision, he climbed over Melanie and exited the Jimmy on the driver's side. Mooney also got out on the driver's side when Melanie leaned forward. The Jimmy was a two-door vehicle and the passenger side door was not operational due to the crash. Melanie was upset and crying and stayed inside the car. Appellant testified that he and Mooney tried to contact Banks. However, before they were able to find Banks, appellant and Mooney had to leave to pick up their children from school. Appellant then climbed back over Melanie and Melanie drove off across the field. Mooney chose to walk back to her apartment. Melanie and Mooney corroborated appellant's story.

The ALJ found that appellant was the driver of the Jimmy both before and after the accident. After observing the testimony of all the witnesses, the ALJ concluded that Mossman, Mattlin, and Rowley, the three disinterested witnesses, were telling the truth and that appellant and his two witnesses told a completely false story in an attempt to exonerate appellant. The ALJ found appellant's version defied common sense. With respect to the witnesses' demeanor, the ALJ noted that Mossman, Mattlin and Rowley were "models of credibility" while appellant, Melanie and Mooney "gave every indication of having rehearsed and fabricated their testimony." The ALJ further determined that such dishonesty

in a peace officer is intolerable and therefore warranted appellant's dismissal from state service.

Appellant filed a petition for writ of mandate in the trial court. He argued that the ALJ's decision was not supported by substantial evidence and that the penalty was excessive and unwarranted. The trial court denied the petition.

DISCUSSION

1. *Standard of Review.*

California State Personnel Board decisions are reviewed only to determine whether substantial evidence supports the determination, even when vested rights are involved. (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125.) In applying the substantial evidence test to such a decision, this court must examine all relevant evidence in the entire record, considering both the evidence that supports the Board's decision and the evidence against it, in order to determine whether that decision is supported by substantial evidence. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) Nevertheless, we do not reweigh the evidence. Rather, we indulge all presumptions and resolve all conflicts in favor of the Board's decision. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.) Moreover, the Board's findings come before this court with a strong presumption as to their correctness and regularity. If the Board's decision is one that could have been made by reasonable people, we do not substitute our own judgment. (*Ibid.*) Further, this court will defer to any credibility determinations made by the ALJ that are based on the ALJ's observations of the demeanor, manner, or attitude of the witnesses. (*Id.* at p. 588.)

As to the penalty imposed, the Board's decision may not be disturbed unless there has been an abuse of discretion. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 217.) On review, neither a trial court nor an appellate court is free to substitute its own discretion in the matter. Nor can the reviewing court interfere with the penalty imposed because in the

court's own evaluation of the circumstances, the penalty appears to be too harsh. (*Cadilla v. Board of Medical Examiners* (1972) 26 Cal.App.3d 961, 966.) Rather, such interference is appropriate only when there is an arbitrary, capricious or patently abusive exercise of discretion, i.e., the action exceeds the bounds of reason. (*Ibid.*; *Kolender v. San Diego County Civil Service Com.* (2005) 132 Cal.App.4th 716, 721.)

2. Substantial evidence supports the Board's decision.

The ALJ noted that this case required a classic credibility determination, i.e., “whether the trier of fact should accept the testimony of three disinterested witnesses who each independently identified appellant as the driver of the Jimmy in the immediate aftermath of the accident, or accept the contrary testimony of appellant, his wife, and the girlfriend of his brother that appellant’s wife was the driver of the Jimmy before, during, and after the accident.” After observing the testimony and the witnesses’ demeanor, the ALJ concluded that the three disinterested witnesses were telling the truth. The ALJ did not believe that appellant climbed over his wife to exit the Jimmy on the driver’s side and then repeated this “awkward maneuver” when he returned. The ALJ also found it “odd that appellant’s wife would continue to drive the vehicle after she had lost control of the vehicle, caused an accident, and was emotionally upset and crying.” Rather, the logical explanation was that appellant was the driver and his wife simply was not present. Accordingly, the ALJ drew the inference that appellant was indeed the driver before, during and after the accident and that he was untruthful during his investigative interview when he claimed that his wife was driving the vehicle.

These credibility determinations are entitled to great weight upon review. (*California Youth Authority v. State Personnel Bd.*, *supra*, 104 Cal.App.4th at p. 588.) Moreover, the evidence the ALJ relied on is “reasonable, credible, and of solid value” that “a reasonable mind might accept as adequate to support a conclusion.” Therefore, “substantial evidence” supports this decision. (*Id.* at pp. 584-585.)

Emphasizing that review of an administrative agency action requires the court to consider all relevant evidence, including evidence against the agency decision, appellant argues that the contrary evidence in this case compels the conclusion that the decision is not supported by substantial evidence. Specifically, appellant points to Melanie Swaim's plea to misdemeanor hit-and-run, the physical evidence pertaining to the inoperability of the Jimmy's passenger side door, and the conflicts in the disinterested witnesses' testimony.

However, Melanie Swaim's voluntary plea of no contest to misdemeanor hit-and-run does not prove that she was driving the Jimmy. "When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation." (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962) 58 Cal.2d 601, 605.) In fact, the deputy district attorney who was initially assigned the case was prepared to go to trial on the hit-and-run charge against appellant. Melanie's plea was entered while this deputy was on vacation and he disagreed with the resolution of the case.

Similarly, the evidence regarding the Jimmy's passenger side door does not undermine the Board's decision. One of appellant's witnesses, a body shop mechanic, testified that this door was damaged and would not open far enough for a person of appellant's size to exit. However, this evidence does not conclusively disprove the finding that appellant was driving the Jimmy. Further, the body shop mechanic's testimony was contradicted by Rowley who testified that she saw a woman exit from the passenger side door. This conflict must be resolved in favor of the Board.

Finally, any conflicts in the disinterested witnesses' testimony are not dispositive. Mossman and Mattlin testified that they saw no one other than appellant while Rowley testified that she observed and spoke with appellant and Tina Mooney. Mossman and Mattlin both watched appellant get into the Jimmy and drive away. Mossman then followed appellant and observed him driving. However, this is not inconsistent with Rowley's

testimony. Mooney testified that after speaking with Rowley, she did not reenter the Jimmy but, rather, walked back to her apartment. The only conflict is between Mossman and Rowley regarding who was present when appellant exited the Jimmy. Such a relatively minor disparity does not cause this testimony to be unworthy of belief.

In sum, the ALJ and the Board relied on reasonable and credible evidence in rendering the decision. Accordingly, it is supported by substantial evidence. Appellant is essentially asking this court to reweigh the evidence and resolve all conflicts in his favor. That is something we cannot do.

3. *The Board did not abuse its discretion in dismissing appellant.*

Appellant was dismissed for dishonesty. Appellant argues that, considering his record with the CDCR, this penalty for one incident of alleged misconduct was excessive and thus constituted an abuse of discretion. Appellant notes that the Board failed to take into account the overriding considerations of “the extent of harm to the public service resulting from [the employee’s] conduct or the likelihood such conduct, if repeated, would result in such harm” and “the circumstances surrounding [the employee’s] misconduct and the likelihood of its recurrence.” (*Paulino v. Civil Service Com.* (1985) 175 Cal.App.3d 962, 971.)

However, a peace officer is in a position of trust and is held to the highest standards of behavior. The officer’s honesty and credibility are crucial to proper performance of his or her duties. Accordingly, dishonesty is intolerable. (*Paulino v. Civil Service Com.*, *supra*, 175 Cal.App.3d at p. 972.) Moreover, “[d]ishonesty is not an isolated act; it is more a continuing trait of character. False statements, misrepresentations and omissions of material facts in internal investigations, if repeated, would result in continued harm to the public service.” (*Kolender v. San Diego County Civil Service Com.*, *supra*, 132 Cal.App.4th at p. 721.)

In reviewing appellant's dismissal, we cannot substitute our own discretion or interfere on the ground that the penalty appears to be too harsh. (*Cadilla v. Board of Medical Examiners*, *supra* 26 Cal.App.3d at p. 966.) Rather, we can only interfere when there is an arbitrary, capricious or patently abusive exercise of discretion. In other words, reversal is justified only when the action exceeds the bounds of reason. (*Ibid.*; *Kolender v. San Diego County Civil Service Com.*, *supra*, 132 Cal.App.4th at p 721.)

Here, the ALJ and the Board concluded that appellant was dishonest regarding his role in the traffic collision. As discussed above, substantial evidence supports this finding. Further, the ALJ and the Board could reasonably infer that appellant involved two other individuals, his wife and Tina Mooney, in the deception.¹ On this record, dismissing appellant did not exceed the bounds of reason. Therefore, the penalty was not excessive as a matter of law.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

Levy, J.

WE CONCUR:

Ardaiz, P.J.

Gomes, J.

¹ Contrary to appellant's position, the fact that Tina Mooney, a cadet at the CDCR academy, was not disciplined for dishonesty is irrelevant. The investigation and hearing pertained to appellant, not Mooney.